

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket 96-45
)	
)	DA 04-998
)	
Supplemented Petitions for Eligible)	
Eligible Telecommunications Carrier Designations)	
_____)	

**NEXTEL PARTNERS' REPLY
TO OPPOSITION OF VERIZON**

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SUMMARY

Nextel Partners' Petition for Designation as an ETC, and the March 24, 2004 Supplement to its Petition, demonstrate Nextel Partners' eligibility for ETC status and that a grant of the Petition is in the public interest. Nextel Partners has effectively complied with all of the Commission's material and relevant requirements from the *Virginia Cellular Order*, and Verizon has not identified any shortcoming in Nextel Partners' Petition and Supplement, nor has Verizon raised any relevant issues in this proceeding that require resolution prior to a grant of Nextel Partners' Petition.

Nextel Partners' primary business focus is to bring high-quality state-of-the-art mobile telecommunications service to citizens in smaller and rural markets. In doing so, Nextel Partners provides its rural customers access to the same highly advanced national network operated by Nextel Communications, Inc. in the top-100 urban markets. Nextel Partners thus fully meets the Universal Service goal of delivering to rural citizens the same telecommunications choices and services that are available to citizens in the largest urban areas. This makes Nextel Partners ideally suited to function as an ETC.

Accordingly, the Commission should proceed expeditiously to grant Nextel Partners' Petition for ETC status.

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NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners"), by its undersigned counsel, hereby submits its "Reply" to the "Opposition" filed on May 7, 2004 by Verizon in the above-captioned proceeding, which concerns the Petitions for Designation as an Eligible Telecommunications Carrier ("ETC") filed by Nextel Partners and several other petitioners. Nextel Partners and the other petitioners recently supplemented the petitions for designation in response to the requirements of the Commission's *Virginia Cellular Order*.¹ Nextel Partners' Supplements to its Petitions were filed on March 24, 2004, and the Commission requested comment by Public Notice issued on April 12, 2004.²

As discussed in greater detail below, Verizon's comments do not directly concern any of Nextel Partners' Petitions, but instead reflect general policy concerns that are more

¹ *In the Matter of Federal-State Joint Board on Universal Service: Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular Order*"). In *Virginia Cellular*, the Commission set forth several requirements for ETC designation in rural areas, and stated that "[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission." *Virginia Cellular Order* at ¶ 4.

² FCC Public Notice, "Parties Are Invited to Comment on Supplemented Petitions for Eligible Telecommunications Carrier Designations," CC Docket No. 96-45, DA 04-998, (released April 12, 2004) (the "April 12 Public Notice")

appropriately addressed in the context of a rulemaking proceeding. To the extent that Verizon raises issues cognizable by the Commission in this context, they are not issues relevant to Nextel Partners' Petitions. Nothing raised in Verizon's "Opposition" warrants any further delays in the processing of the pending ETC applications listed in the April 12, 2004 FCC Public Notice. Accordingly, each of Nextel Partners' Petitions for Designation should be expeditiously considered on their merits and granted by the Commission.³

A. Verizon's Contentions

Verizon opposes all of the petitions for ETC status pending before the Commission on the basis that the cost to the USF would be "dramatic" if the pending petitions, *and others like them*, were granted.⁴ Verizon complains that the pending ETC petitions do not discuss the cumulative effect if the FCC and all state commissions were to grant "all pending and future ETC petitions."⁵ Verizon attaches spreadsheets that purport to estimate the High Cost Fund amounts involved in the *Virginia Cellular Order*, the *Highland Cellular Order*,⁶ and all pending FCC petitions for ETC designation and redefinition, and claims that grants of all the petitions could increase the size of high cost funds by \$376 million per year.⁷ As revealed in the fine print at the end of Verizon's lengthy tables, Verizon's projections of costs to the USF are based on the assumptions

³ Verizon Opposition at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37 (released April 12, 2004) ("*Highland Cellular Order*").

⁷ Verizon Opposition at 2.

that *all* pending ETC applicants will be granted designation and will upon designation capture *every single customer* in their respective designated areas.

Verizon also claims that these new ETCs, if granted, would “capture” up to \$112 million in non-rural, CALLS-based high cost support, potentially diluting the CALLS fund, which is capped at \$650 million per year. Again, Verizon’s computations are based on an assumption that all pending petitions for designation in all jurisdictions will be granted, and that the newly designated ETCs will then proceed to capture every single line in their respective study areas. Verizon states that such an outcome would threaten to “unravel the access charge reform established by the CALLS Order.”⁸ For these reasons, Verizon contends that the Commission should not grant future ETC petitions until the FCC’s Portability Proceeding is finally resolved.⁹

Verizon also attempts at length to refute the position adopted by Sprint in its Petition for Reconsideration of the *Virginia Cellular Order* that the public interest factors stated in that Order apply only to rural, and not to non-rural, service areas.¹⁰ Verizon claims that Sprint’s interpretation is an incorrect analysis of the language of Section 214(e)(6) of the Communications Act of 1934, as amended (the “Act”). Verizon claims that the Commission should deny “any pending petition for ETC status in non-rural areas

⁸ *Id.* at 3, citing *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) (“CALLS Order”), *aff’d in part, rev’d and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

⁹ *Id.* at 5.

¹⁰ Verizon Opposition at 5-9.

that fails to analyze whether such designation would satisfy the public interest standard set forth in the *Virginia Cellular Order*.¹¹

Finally, Verizon argues that any ETC petitioner seeking redefinition of a rural telephone company (“RTC”) study area for the reason that the petitioner’s licensed service area does not cover all of the RTC study area should be required to address the Commission’s statements on cream skimming in the Commission’s *Highland Cellular Order*.¹²

B. Nextel Partners’ Response

1. Verizon’s Opposition does not find fault with, or even address the merits of, any of Nextel Partners’ Petitions

Verizon’s Opposition is not directed specifically at any of Nextel Partners’ ETC Petitions pending before the Commission. Verizon’s Opposition instead comments on such issues as the overall process of designating ETCs, managing the size of the Universal Service Fund (“USF”), and the correct implementation of Section 214(e)(6) of the Act. As such, the Opposition is not concerned with the merits of any of Nextel Partners’ ETC Petitions, and does not offer any analysis to the Commission that can be used to evaluate, on a case-by-case basis, whether Nextel Partners’ Petitions may be granted. While Verizon’s remarks may be of interest in a different context, such as the FCC’s Portability Proceeding Rulemaking, or the proceeding considering Sprint’s Reconsideration of the Commission’s *Virginia Cellular Order*, they do not bear on any relevant issue before the Commission in the proceedings for which the April 12 Public Notice was issued. In addition, Verizon’s comments are contrary to existing law. The

¹¹ *Id.* at 5.

¹² *Id.* at 10-11.

current ETC law requires designation of competitive wireless ETCs as long as the wireless ETCs provide the required services and meet requirements of the public interest test. NPI has met all of these requirements. Instead of commenting on the merits of the specified ETC petitions as requested by the Commission in its April 12, 2004 Public Notice, Verizon is using this proceeding in an improper attempt to advance its flawed arguments for USF reform.

2. Verizon's speculations concerning the impact of additional ETC grants on the growth of the USF cannot properly be addressed in this context

Verizon goes to great lengths in an effort to prove that if additional ETCs are granted, the High Cost Fund will grow. It is not reasonably possible to verify the accuracy of Verizon's calculations, because they depend on too many speculative future events. As already noted, Verizon's calculations are based on an assumption that every application for designation currently pending at the FCC and before the states will be granted, and that upon grant, each of the new ETCs will capture every single line in their respective designated areas.

However, it is not necessary to attempt to validate or refute Verizon's representations concerning potential impact on the USF in the context of this proceeding. The April 12 Public Notice seeks the comments of interested parties on the merits of the individual petitions for designation of several carriers seeking ETC status in several different states, each of which must be considered on a case-by-case basis under the Commission's Rules. The Commission has made it clear that, apart from these individualized public interest determinations, the larger issue of how to manage the growth of the fund in light of the addition of new competitive ETCs is a matter relegated in the first instance to the Joint Board process:

[t]he Commission has asked the Joint Board to examine, among other things, the Commission's rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines. We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost support in competitive areas could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future. It is our hope that the Commission's pending rulemaking proceeding will also provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.¹³

Verizon's macro worst-case scenario projections are not valid under the tests established in the *Virginia Cellular Order* for assessing the potential impact of a particular application on the USF. Specifically, in the context of making a public interest determination on a particular application, the *Virginia Cellular Order* countenances looking at the possible maximum impact that grant of that single application could have in comparison to the total USF.¹⁴ It does not, however, countenance assessing the possible maximum impact that grant of all pending applications everywhere might have on the size of the fund as a factor for making a public interest determination on any single specific application. In sum, the Commission has fashioned the appropriate vehicle for addressing the "macro" concerns voiced by Verizon: a rulemaking process involving the Joint Board. Verizon's issues are more appropriately addressed in that context, and far exceed the scope of the instant proceedings.¹⁵

¹³ See *Virginia Cellular Order* at ¶ 31.

¹⁴ See *id.* at ¶31, n.96.

¹⁵ See, e.g., *In the Matter of Federal-State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama*, 17 FCC Rcd 23532 at ¶¶ 22 and 26 (2002) ("RCC Order") at ¶ 32 ("We recognize that these parties raise important issues regarding universal service high-cost support. We find, however, that these *concerns* are beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.")

3. Verizon's speculations concerning the impact of additional ETC grants on access charge reform exceed the scope of this proceeding and do not justify further delays in proceeding pending ETC applications before the Commission

Verizon argues that if additional ETCs are granted, it may adversely impact access charge reform by diluting the CALLS fund, which is capped at \$650 million annually. As noted above with regard to the issues raised by Verizon with respect to the growth of the USF, this argument relates to matters of general policy already before the Commission in other contexts. The instant proceeding, which concerns the merits of several pending petitions for ETC status, is not the proper venue in which to raise such matters.

Verizon urges the Commission to delay the processing of any additional ETC petitions until the Commission's Portability Proceeding is ultimately resolved.¹⁶ Contrary to Verizon's suggestion, however, general concerns pertaining to the growth of the USF and/or access charge reform do not justify the imposition of any further delays in the processing of the ETC petitions already pending before the Commission, which have already gone far beyond the six-month processing deadline the Commission assigned to itself for considering competitive ETC petitions.¹⁷ Existing law requires these petitions to be processed, and the Commission is bound to abide by *existing* rules and policies in

¹⁶ Verizon Opposition at 1.

¹⁷ In the *Twelfth Report and Order* in Docket 96-45, the Commission committed to attempt to resolve ETC designation petitions in a six-month time frame, recognizing that "excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas." *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264 (2000) ("*Twelfth Report and Order*").

all proceedings.¹⁸

The Commission's *Virginia Cellular Order* clearly sets forth the requirements that a Petitioner must satisfy in order to be granted ETC status. In setting forth those standards, the Commission was aware of the important unresolved policy issues relating to Universal Service but determined that further delay in the consideration of ETC petitions was not in the public interest. Balancing the importance of moving to decision on pending ETC petitions with the unresolved policy issues the Commission held, "The framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission."¹⁹ The Commission elaborated:

[W]e note that the outcome of the Commission's pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Virginia Cellular and other ETCs may receive in the future. This Order is not intended to prejudge the outcome of that proceeding."²⁰

Thus, it is clear that in the *Virginia Cellular Order* the Commission rejected the approach now advanced by Verizon that consideration of pending ETC applications be held in abeyance indefinitely while matters of policy and law such as the issues contained in the Commission's Portability Proceeding are ultimately worked out. Rather, the Commission adopted standards that allow it to move forward to decision on pending ETC petitions, while acknowledging that those standards are subject to amendment by future Commission actions.

¹⁸ *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) ("Under the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.").

¹⁹ *Virginia Cellular Order* at ¶ 3.

²⁰ *Id.* at ¶ 12.

4. Verizon's lengthy attempt to refute Sprint's position in the *Virginia Cellular Order* reconsideration petition is irrelevant in the context of this proceeding; but in any case, Nextel Partners' Petitions as supplemented make all of the showings required by the *Virginia Cellular Order*

Verizon argues for nearly 5 of its 12 pages that the position taken by Sprint in its petition for reconsideration of the *Virginia Cellular Order* is incorrect.²¹ Sprint's position is that the public interest test enunciated by the Commission in the *Virginia Cellular Order* is not properly applicable to designation of competitive ETCs in non-rural ILEC study areas. Verizon disagrees. The only thing that is not entirely clear is why Verizon chose this particular forum for its comments on Sprint's petition for reconsideration. Verizon's comments would have been appropriate in the reconsideration proceeding, or perhaps even in a rulemaking before the Commission. However, they are largely if not completely irrelevant here. The Commission already made its decision in the *Virginia Cellular Order* with regard to the application of a public interest test to the designation of ETCs in non-rural ILEC study areas.²² As stated by the Commission:

We note that the Bureau previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based on a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act. We do not believe that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the requesting carrier complies with Section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance.²³

In light of the Commission's decision, unless and until the Commission reconsiders its position or is otherwise reversed, the ruling stands and must be followed. For purposes

²¹ Verizon Opposition at 5-9.

²² *Virginia Cellular Order* at ¶ 27.

²³ *Id.*

of the instant proceeding, then, there is no controversy on the issue that needs to be addressed.

Insofar as Nextel Partners' Petitions presently before the Commission are concerned, however, each of the Petitions as supplemented by its March 24, 2004 Supplement addresses the public interest issue at length, demonstrating beyond question that the public cost in each instance is far outweighed by the benefits, including: (i) increased competitive choice; (ii) state of the art digital communications; (iii) access to communications in situations where a consumer cannot utilize a wireline telephone; (iv) the unique benefit of *mobility* that cannot be matched by landline service providers; (v) wireless access to emergency services; and (vi) significantly larger local calling areas than the ILEC.²⁴

5. Because Nextel Partners does not request redefinition of any RTC study area, no showing with respect to creamskimming is required for any of Nextel Partners' Petitions

Verizon's comment that ETC petitioners seeking to cover only part of a RTC study area must include a showing addressing the Commission's cream skimming statements in the *Highland Cellular* case is inapplicable to Nextel Partners. As the Commission has explained, cream skimming becomes an issue *only* in cases where a party makes "a request for ETC designation for an area less than the entire area of a rural telephone company."²⁵ This situation is clearly inapplicable to Nextel Partners' Petitions because Nextel Partners has not requested redefinition of *any* RTC study area, but instead

²⁴ See, e.g., Nextel Partners' March 24, 2004 Supplement filed in the Alabama ETC proceeding at 7-9.

²⁵ *Virginia Cellular Order* at 16, ¶¶ 32-33.

has intentionally limited its Designated Areas to those study areas and exchanges that Nextel Partners is legally entitled to serve in their entirety.

III. CONCLUSION

Because all applicable legal and public interest requirements have been met, Nextel Partners requests that the Commission promptly grant Nextel Partners' Petitions for Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee and Virginia.

Respectfully submitted,

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